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[Proposed] Counsel for the Official
Committee of Unsecured Creditors

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

In re:

Fili Enterprises, Inc., d/b/a Daphne's Greek
Café, a California corporation,

Debtor

Case No.: 10-00324-PB11

Chapter 11

**MOTION OF THE OFFICIAL
COMMITTEE OF UNSECURED
CREDITORS FOR ORDER
APPROVING INFORMATION
ACCESS PROTOCOL UNDER
SECTIONS 105(A), 107(b), AND
1102(b)(3)(A) OF THE BANKRUPTCY
CODE; MEMORANDUM OF POINTS
AND AUTHORITIES; AND
DECLARATION OF JEFFREY N.
POMERANTZ IN SUPPORT
THEREOF**

Date: February 17, 2010
Time: 11:00 a.m.
Place: Dept. 4, Rm. 328
325 West "F" Street
San Diego, CA 92101

62651-001\DOCS_LA:214817.3

**MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR ORDER
APPROVING INFORMATION ACCESS PROTOCOL UNDER §§ 105(A), 107(B), AND 1102(B)(3)(A)
OF THE BANKRUPTCY CODE; MEMORANDUM OF POINTS AND AUTHORITIES; AND
DECLARATION OF JEFFREY N. POMERANTZ IN SUPPORT THEREOF**

**TO THE HONORABLE PETER W. BOWIE, UNITED STATES BANKRUPTCY
JUDGE, CREDITORS HOLDING THE 20 LARGEST UNSECURED CLAIMS,
SECURED CREDITORS, PARTIES REQUESTING SPECIAL NOTICE, AND THE
OFFICE OF THE UNITED STATES TRUSTEE:**

The Official Committee of Unsecured Creditors (the “Committee”) hereby moves this Court (the “Motion”) for entry of an order pursuant to Sections 105(a), 107(b), and 1102(b)(3)(A) of title 11 of the United States Code (the “Bankruptcy Code”) and Rule 9018 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), approving the Committee’s adoption of certain information sharing procedures pursuant to Section 1102(b)(3)(A) of the Bankruptcy Code.

Specifically, the Committee requests authority to (a) withhold confidential and privileged information under the “information access” prong of the statute, and (b) satisfy its duties under the “comment solicitation” prong of the statute by means of a link to a web page posted on, and accessible via, an internet website dedicated to the Committee. The Committee seeks to satisfy its information sharing obligations in as streamlined and inexpensive a manner as possible. Thus, the Committee will communicate with its constituency through, inter alia, the website established at: www.pszjlaw.com.

This Motion is based on the facts and legal analysis set forth in the accompanying Memorandum of Points and Authorities, the Declaration of Jeffrey N. Pomerantz, the record in this case, any other evidence properly before the Court prior to or at the hearing on the Motion and all matters of which this Court may properly take judicial notice.

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1 **WHEREFORE**, the Committee respectfully requests that the Court enter an order
2 approving the Motion and granting such other and further relief as this Court deems just and
3 proper.

4
5 Dated: February 1, 2010

PACHULSKI STANG ZIEHL & JONES LLP

6
7 By /s/ Jeffrey N. Pomerantz
8 Jeffrey N. Pomerantz
9 Shirley S. Cho
10 [Proposed] Counsel for the Official
11 Committee of Unsecured Creditors
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PACHULSKI STANG ZIEHL & JONES LLP
ATTORNEYS AT LAW
LOS ANGELES, CALIFORNIA

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **JURISDICTION**

3 1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and
4 1334. Venue of this case and this Motion in this district is proper pursuant to 28 U.S.C. §§ 1408
5 and 1409.

6 2. The statutory predicates for the relief sought herein are Sections 105(a), 107(b),
7 and 1102(b)(3) of the Bankruptcy Code and Bankruptcy Rule 9018.

8 **FACTS**

9 3. On January 11, 2010, Fili Enterprises, Inc. *dba* Daphne's Greek Café *aka*
10 Daphne's Greek Express (the "Debtor") filed a voluntary petition for relief under chapter 11 of
11 the Bankruptcy Code. The Debtor continues to operate its business and manage its property as a
12 debtor-in-possession.

13 4. On January 27, 2010, the United States Trustee appointed the Committee in the
14 case pursuant to Section 1102 of the Bankruptcy Code.

15 5. The Committee has selected Pachulski Stang Ziehl & Jones LLP as its insolvency
16 counsel.

17 **ARGUMENTS AND AUTHORITY**

18 6. Section 1102(b)(3)(A) states, in relevant part, that a committee appointed under
19 Section 1102(a) shall "provide access to information for creditors who (i) hold claims of the kind
20 represented by that committee; and (ii) are not appointed to the committee[.]" 11 U.S.C.
21 § 1102(b)(3)(A). Section 1102(b)(3)(B) further provides that a committee must "solicit and
22 receive comments from the creditors described in subparagraph (A)[.]" 11 U.S.C.
23 § 1102(b)(3)(B).

24 7. Sections 1102(b)(3)(A) and (B) do not indicate how a creditors' committee should
25 provide "access to information" for creditors, or "solicit and receive comments" from creditors.
26 There is no legislative history to Section 1102(b)(3) to provide guidance on the application of this
27 new provision, and whether it could be construed to apply to confidential or privileged
28 information.

8. For purposes of this Motion, the term “Confidential Information” means any non-public or proprietary information of the Debtor or the Committee, including, without limitation, information concerning the Debtor’s assets, liabilities, business operations, projections or analyses, which is obtained pursuant to the terms of a confidentiality agreement.¹ The term “Privileged Information” means any information that is subject to the attorney-client or attorney work product privilege, whether such privilege is solely controlled by the Committee or is a joint privilege with the Debtor or some other party.

9. The enactment of Section 1102(b)(3)(A) raises the issue of whether the Committee could be required to share Confidential Information or Privileged Information with any unsecured creditor. Given the importance of this issue, the Committee seeks an order of the Court confirming that Section 1102(b)(3)(A) does not authorize or require the Committee to provide access to each and every piece of Confidential Information or Privileged Information to any creditor that the Committee represents. *In re Refco, Inc.*, 336 B.R. 187 (Bankr. S.D.N.Y. 2006) (Section 1102(b)(3) does not require the dissemination of confidential information or such information that would constitute a breach of attorney-client privilege. In determining whether to release information, committees must consider the requesting party’s willingness to agree to confidentiality and trade restraints.).

10. Section 1102(b)(3)(B) does not specifically address how a committee should “solicit and receive comments” from its constituents. The Committee proposes to satisfy this statutory requirement in two ways. First, the Committee will add information to a dedicated creditor information webpage at www.pszjlaw.com that will contain (a) links to public sources for pleadings and other case information (such as PACER and this Court’s internet site), (b) documents that can be downloaded or viewed using the Adobe Acrobat reader, (c) links to email addresses for Committee counsel to whom questions or information requests may be

¹Confidential Information would not, however, include information that: (i) is or becomes generally available to the public or is or becomes available to the Committee on a non-confidential basis, in each case to the extent that such information became so available other than by a violation of a contractual, legal, or fiduciary obligation to the Committee or the Debtor (ii) is or can become available to the public due to prior disclosures; or (iii) was in the possession of the Committee prior to its disclosure by the Debtor and is not subject to any other duty or obligation to maintain confidentiality.

1 directed, (d) periodic updates or reports to creditors generally, and (e) such other information as
2 the Committee deems appropriate. In each instance, of course, only non-confidential and non-
3 privileged information would be made available to the Committee's constituency. In addition to
4 the foregoing, the Committee will post newsletters on the web page or through a mailing to the
5 Debtor's applicable creditor list if and when necessary to communicate with the unsecured
6 creditors.

7 11. When a statute is clear and unambiguous, "the sole function of the courts is to
8 enforce it according to its terms." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241
9 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). However, in "rare cases
10 [in which] the literal application of a statute will produce a result demonstrably at odds with the
11 intention of its drafters ... the intention of the drafters, rather than the strict language, controls."
12 *Id.* at 242-43 (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982) (internal quotation
13 omitted)).

14 12. The Committee submits that Section 1102(b)(3) is unclear. The statute requires a
15 committee "to provide access to information" and to "solicit and receive comments" from
16 creditors, yet sets forth no guidelines as to the type, kind and extent of the information to be
17 provided or the method for soliciting input from creditors. In its extreme, Section 1102(b)(3)(A)
18 could be read as requiring a committee to provide access to all information provided to it by a
19 debtor, or developed through exercise of its investigative function, regardless of whether the
20 information is confidential, privileged, proprietary or material non-public information and
21 regardless of whether disseminating such information implicates securities laws disclosure
22 requirements. *See* 17 C.F.R. §§243.100-243.103 (2005); *see also In re Refco, Inc.*, 336 B.R. 187
23 (S.D.N.Y. 2006) (Granting the motion of the committee to clarify the requirement to provide
24 access to information pursuant to Section 1102(b)(3)(A) until the court further clarifies the
25 requirements under Section 1102 or the committee establishes an information-sharing protocol);
26 *In re FLYi, Inc.*, Case No. 05-20011 (MFW) (Bankr. D. Del. Nov. 17, 2005) (providing that
27 creditors' committees are not authorized or required to provide access to confidential information
28 of the debtors or to privileged information). Similar relief as the relief requested herein has been

1 granted in this District in other chapter 11 cases. *See, e.g., In Re The Roman Catholic Bishop of*
2 *San Diego*, Case No. 07-00939 (Bankr. S.D. July 26, 2007).

3 13. As discussed above, the legislative history does not provide meaningful guidance
4 and merely reiterates the language of Section 1102(b)(3). *See* H.R. Rep. No. 109-31, 109th
5 Cong., 1st Sess. 87 (2005) (“Section 405(b) [of the Bankruptcy Abuse Prevention and Consumer
6 Protection Act of 2005] requires the committee to give creditors having claims of the kind
7 represented by the committee access to information. In addition, the committee must solicit and
8 receive comments for these creditors and, pursuant to court order, make additional reports and
9 disclosures available to them.”).

10 14. The Committee believes that Section 1102(b)(3) was intended to expand the
11 involvement of unsecured creditors in chapter 11 cases. In this regard, however, Congress could
12 not have intended for a committee to be required to provide unfettered access to every type and
13 kind of information that a committee receives from a debtor or assembles on its own. If this had
14 been the intention, Section 1102(b)(3) would frustrate numerous provisions of the Bankruptcy
15 Code.

16 15. Further, Section 107(b)(1) provides that “on request of a party in interest, the
17 bankruptcy court shall . . . protect an entity with respect to trade secret or confidential research,
18 development, or commercial information.”² Section 107(b)(1) is mandatory. *Video Software*
19 *Dealers Ass’n v. Orion Pictures Corp.*, 21 F.3d 24, 27 (2d Cir. 1994) (providing that the
20 protections of Section 107(b)(1) are mandatory upon request). As a result, under Section
21 107(b)(1) and Bankruptcy Rule 9018, this Court is empowered to protect the Committee from
22 having to release Confidential Information or Privileged Information to general creditors. The
23 Court has further authority under Section 105(a) to issue any order, process or judgment that is
24 necessary or appropriate to carry out the provisions of the Bankruptcy Code. Protecting the
25 release of Confidential Information and Privileged Information is necessary to accomplish that
26

27 ² Section 107(b)(1) is further supported by Bankruptcy Rule 9018, which states, in relevant part, that “on
28 motion or on its own initiative, with or without notice, the court may make any order which justice requires to protect
the estate or any entity in respect of a trade secret or other confidential research, development, or commercial
information” Fed. R. Bankr. P. 9018.

1 purpose.

2 16. The disclosure of nonpublic or privileged information to unsecured creditors will
3 impede the ability of the Committee to perform its statutory function in this case. Therefore,
4 pursuant to Sections 105(a), 107(b)(1), and 1102(b)(3)(A) and Bankruptcy Rule 9018, the
5 Committee requests confirmation that Section 1102(b)(3)(A) does not authorize or require the
6 Committee to provide access to Confidential Information or Privileged Information to any
7 creditor that the Committee represents.

8 17. In addition, given the lack of clarity in Section 1102(b)(3)(B) regarding the
9 Committee's duty to solicit and receive comments from its constituency, the Committee seeks an
10 order establishing that this statutory obligation is satisfied by the Committee creating and
11 maintaining a web page dedicated to the Committee, to make non-confidential and non-privileged
12 information available to its constituency.

13 CONCLUSION

14 WHEREFORE, the Committee respectfully requests that the Court enter an order
15 approving the relief requested in this Motion and granting the Committee such other and further
16 relief to which it may be entitled.

17 Dated: February 1, 2010

PACHULSKI STANG ZIEHL & JONES LLP

18
19 By /s/ Jeffrey N. Pomerantz
Jeffrey N. Pomerantz
Shirley S. Cho
[Proposed] Counsel for the Official
20 Committee of Unsecured Creditors
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DECLARATION OF JEFFREY N. POMERANTZ

I, Jeffrey N. Pomerantz, declare as follows:

1. I am an attorney admitted to practice law in the State of California and before this Court and am a partner of Pachulski Stang Ziehl & Jones LLP, proposed counsel for the Official Unsecured Creditors Committee. I submit this Declaration in support of the Motion of the Official Committee of Unsecured Creditors for Order Approving Information Access Protocol Under Section 1102(b)(3) of the Bankruptcy Code.

2. I have personal knowledge of the facts set forth in the foregoing Motion and, if called upon as a witness, I could and would competently testify as to all of the matters stated therein.

3. On January 11, 2010, the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtor continues to operate its business and manage its property as a debtor-in-possession.

4. On January 27, 2010, the United States Trustee appointed the Committee in the Debtor's bankruptcy case pursuant to Section 1102 of the Bankruptcy Code.

5. The Committee has selected Pachulski Stang Ziehl & Jones LLP as its insolvency counsel.

6. The Committee proposes to satisfy this statutory requirement in two ways. First, the Committee will add information to a dedicated creditor information webpage at www.pszjlaw.com that will contain (a) links to public sources for pleadings and other case information (such as PACER and this Court's internet site), (b) documents that can be downloaded or viewed using the Adobe Acrobat reader, (c) links to email addresses for Committee counsel to whom questions or information requests may be directed, (d) periodic updates or reports to creditors generally, and (e) such other information as the Committee deems appropriate. In each instance, of course, only non-confidential and non-privileged information would be made available to the Committee's constituency. In addition to the foregoing, the Committee will post newsletters on the web page or through a mailing to the Debtor's applicable creditor list if and when necessary to communicate with the unsecured creditors.

1 I declare under penalty of perjury under the laws of the State of California and the United
2 States of America that the foregoing is true and correct.

3 Executed this 1st day of February, 2010, at Los Angeles, California.

4 /s/ Jeffrey N. Pomerantz

5 Jeffrey N. Pomerantz

PACHULSKI STANG ZIEHL & JONES LLP
ATTORNEYS AT LAW
LOS ANGELES, CALIFORNIA

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
 CITY OF LOS ANGELES)

I, Sophia L. Lee, am employed in the city and county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 10100 Santa Monica Blvd., 11th Floor, Los Angeles, California 90067-4100.

On February 1, 2010, I caused to be served the **MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR ORDER APPROVING INFORMATION ACCESS PROTOCOL UNDER SECTIONS 105(A), 107(B), AND 1102(B)(3)(A) OF THE BANKRUPTCY CODE; MEMORANDUM OF POINTS AND AUTHORITIES; AND DECLARATION OF JEFFREY N. POMERANTZ IN SUPPORT THEREOF** in this action by placing a true and correct copy of said document(s) in sealed envelopes addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

- ☒ (BY MAIL) I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- ☐ (BY FAX) I caused to be transmitted the above-described document by facsimile machine to the fax number(s) as shown. The transmission was reported as complete and without error. (Service by Facsimile Transmission to those parties on the attached List with fax numbers indicated.)
- ☐ (BY PERSONAL SERVICE) By causing to be delivered by hand to the offices of the addressee(s).
- ☐ (BY OVERNIGHT DELIVERY) By sending by _____ to the addressee(s) as indicated on the attached list.

I declare under penalty of perjury, under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed on February 1, 2010, at Los Angeles, California.

/s/Sophia L. Lee
 Sophia L. Lee

SERVICE LIST

In re: Fili Enterprises, Inc., d/b/a Daphne's Greek Café, a California corporation
USBC Case No. 10-00324-PB11

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 US Bankruptcy Court – Southern District of
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 325 West F Street, Dept. 4, Room 328
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AW Southglenn, LLC
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 Cornerstar Colorado, LLC
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